UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SCOTT C., a minor individual, by and through his parents and natural guardians, SHARON C. AND PETER C. and SHARON C. AND PETER C., individually: Plaintiffs,	:	No. 02-CV-4023
v.	:	
COLONIAL INTERMEDIATE UNIT 20 Defendant.	:	

BRIEF IN SUPPORT OF MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

I. STATEMENT OF FACTS

Plaintiffs,Plaintiffs, Scott C., a mPlaintiffs, Scott C., a minor, SharPlaintiffs, Scot naturalnatural guardians of Scott C., have brougnatural guardians of Scott C., have bro rightsrights under Section 504 of the Rehabilitation Act (Sectionrights under Se IndividualsIndividuals with DisabiliIndividuals with DisabilitieIndividuals with Disabi (§1983").

AtAt all relevant tiAt all relevant times, At all relevant times, Scott C. was a sp residedresided iresided inresided in resided in theresided in the Bethlehem Area School attendattend aattend a partial hospitalization program at Nitschmann Middle School ina BethlehemBethlehem School District untilBethlehem School District until the end of his ¶22)¶22) ¶22) He entere¶22) He entered the Freedom II program at Freedom High S BethlehemBethlehem School District in September 1999 and remaiBethlehem School D tenth grade year. (Complaint, ¶24)

PlaintiffPlaintiff alleges that BASD served as the LocalPlaintiff alleges that BASD serve forfor Scott whilefor Scott while he attended the CIU s partial programsfor Scott while h forfor providing Scott with a free appropriate public edfor providing Scott wit (Complaint, ¶27)(Complaint, ¶27) (Complaint, ¶27) Plaintiff also alleges that Defendant C UnitUnit 20 (CIU 20") was paid by BASD for oversight of its special education departmentdepartment until the 2001-2002 school year adepartment until th responsibility for delivery of FAPE to Scott. (Complaint, ¶21)

PlaPlaintiPlaintiffs Plaintiffs Complaint contends that CIU 20 discriminated agains ininin that it excluded Scott from his regular education, non-disabled peers, that hishis instructional day was shorter than regular educatihis instructional day was short thethe curriculumthe curriculum in CIU 20'sthe curriculum in CIU 20's partial programs w to those offered to non-disabled students. (Complaint, ¶29, 30, 33)

PlaintiffsPlaintiffs also contendPlaintiffs also contend that Plaintiffs also conten provisionprovision ofprovision of educational services becauseprovision of educational toto proto provide Scott with FAPE in the least restrictive environment (LRE to (Complaint, ¶1)

CountCount ICount I of Plaintiffs Complaint alleges that CIU has violated SectionCo bbyby unlawfully segregating Scott while he was in CIU 20's partial prograby unlawfully itsits mismanagement of BASD s special education programs througits mismanagemen ofof the 2000-2001 school year; that Scott was excluded from his non-disabled

peers;peers; denied the benefits of equal education; and was subjecpeers; denie discriminationdiscrimination while attending programsdiscrimination while attending p 20. (Complaint, ¶49,50)

CountCount II alleges thatCount II alleges that through the end ofCount II alleges tha diddid not have its own, independedid not have its own, independent sdid not have specialspecial education director and special education supervisors were CIU 20 employeesemployees andemployees and all decisions about Scott s programming were n sstaff.staff. (Complaint, ¶53) Plaintiff also alleges that CIU 20 violated the IDEA by failing to provide Scott with FAPE in the LRE.

CountCount IICount III aCount III alleges that CIU 20 deprived Scott of his federall rights,rights, incrights, including his rrights, including his right to FAPE in the LRE and discrimination.discrimination. (Complaint, ¶56) Plaintiffdiscrimination. (Complaint, ¶56 oror or custom ofor custom of engaging in unlawful activities and the actions taken b werewere a product of official poliwere a product of official policwere a prod (Complaint, ¶57)

PlaintiffPlaintiff has brought Plaintiff has brought an Plaintiff has brought an DistrictDistrict on the identical factsDistrict on the identical facts and settingDistrict or aatat Docketat Docket No. 00-CV-642. That matter is currently scheduled for trial i JanuaryJanuary 2003 before JudgeJanuary 2003 before Judge Bruce W. Kauffman. (See att 642 and the underlying complaint)

II. STATEMENT OF ISSUES

A.A. WHETHER PLAINTIFFS COMPLAINT FAILS TOA. WHETHER PLAINTIFFS COMPLAINT UNDER §504 OF THE REHABILITATION ACT?

Suggested Answer: Yes.

B.B. WHETHER PLAINTIFFS COMPLB. WHETHER PLAINTIFFS COMPLAINT B. WHETHER UNDER THE INDIVIDUALS WITH DISABILITIES ACT?

Suggested Answer: Yes.

C.C. WHETHER PLAINTIFFS COMPLAINT FAILS TO STC. WHETHER PLAINTIFFS COMPLAINT UNDER 42 U.S.C. SECTION 1983?

Suggested Answer: Yes.

III. ARGUMENT

STANDARD APPLICABLE TO FED.R.CIV.P. 12(b)(6)

WhenWhen determining a Rule 12(b)(6) moWhen determining a Rule 12(b)(6) mot ththethe facts alleged in the Complaint and its attachments. Jordon v. Fox, Rothschild,Rothschild, O Brien & Frankel, 20 F.3d 1250,, 20 F.3d 1250, 1261 (3d Cir. 1994). , 20 acceptaccept asaccept as true all well pleaded allegations in theaccept as true all well ple thethe lightthe light most favorable to the plaintiff. the light most favorable to the plain Inc.,, 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b), 764 F.2d 939, 944 (3d Cir. 1985). A R whenwhen a plaintiff cannot prove any setwhen a plaintiff cannot prove any set of facts, whichwhich would entitle himwhich would entitle him orwhich would entitle him or he 401 (3d Cir. 1988)

However,However, a pleading is nHowever, a pleading is not suHowever characterizationscharacterizations or unsubstantiated conclusions. Fleming v. Lind-Wald Co.,, 922 F.2d 20, 23, 2, 922 F.2d 20, 23, 24 (1st C Cir. 1990); The Dartmouth Review v. D College,, 889, 889 F.2d 13 (1st Cir 1989); Vandenplas v. City of Muskego, 753 F.2d 555, 560 (7th Cir. 1985).

> MostMost often, facts are susceptible to objective Most often, facts ConcConclusions,Conclusions, on the other hand, are Conclusions, on the othe usualusual case. They represent the pleader susual case. They represent the calledcalled inferences from,called inferences from, thcalled inferences suchsuch such conclusionssuch conclusions such conclusions aresuch conclusi tththethe stated facts, that is, when the suggested inference rises to whatwhat what experience indicates is an acceptable level of probabilityw that conclusions become facts for pleading purposes.

Dartmouth College, at 13.

BareBare legal conclusionBare legal conclusions Bare legal conclusions attached t StraussStrauss v. City of ChicagStrauss v. City of Chicago, 760 F.2, 760 F.2d 765, 768 (7t shoshouldshould should reject legal conclusions , unsupported conclusions , unwarr inferences ,inferences , unwarranted deductions , footlessinferences , unwarrante sweeping sweeping legal sweeping legal conclusions in the form sweeping legal conclu LowerLower Merion School District, 132 F.3d, 132 F.3d 902, n.8 (3d Cir. 1997) *quoting*,, Cha A.A. Wright and Arthur L. Miller, FEDERALA. Wright and Arthur L. Miller, FEDERAL PRACTI Ed.Ed. 1997); *see also*, Leeds v. MelLeeds v. Meltz, 85 F.3d 51, 53 (2d Cir. 1996)(affirm dismidismissaldismissal of §19dismissal of §1983 action and noting that while the plea liberalliberal one, bald asserliberal one, bald assertions and liberal one

suffice. suffice.);Fernandez-MontesFernandez-Montes v. Allied Pilots Ass n, 987 F.2d 2
1993)(1993)(co1993)(conclusory1993)(conclusory allegations or legal conclusions mas
conclusions will not suffice to prevent a motion to dismiss.).

Here,Here, the facts Here, the facts interpreted in the light most favorableHere, th
thatthat Plaintiff failsthat Plaintiff fails satisfy the abovethat Plaintiff fails satisfy the abov
ComplaintComplaint againstComplaint against CIU 20 actually sounds in Breach of Contra
neitherneither of which are pled. Accordinglyneither of which are pled. Accordingly,neit
be granted.

A.A. COUNT I OF PLAINA. COUNT I OF PLAINTIFFS A. COUNT I OF PLAINTIFFS COMPL
UNDER SECTION 504 OF THE REHABILITATION ACT.

PlaintiffsPlaintiffs clPlaintiffs claPlaintiffs claim that Defendant CIU 20 unlawfully
whilewhile he was enrolledwhile he was enrolled inwhile he was enrolled in the pa
mismanagedmismanaged BASD s special education programs through tmismanaged BASD
20012001 school year.2001 school year. Plaintiffs claim2001 school year. Plaintiffs claim
toto exhaust their administrative remedies against CIU 20;BASD, not CIUto exhaust their ad
partyparty ultimately responsible for compliance wparty ultimately responsible for co
504 does not furnish a basis for affirmative relief.

InitiallyInitially it is noted thatInitially it is noted that the Bethlehem School District
partyparty ultimately respparty ultimately responsibleparty ultimately responsible party
Springs School District v. Cmwlth of Pa. Dept.Springs School District v. Cmwlth of Pa. De
A.2dA.2d 943 (Cmwlth. Ct. 1984), a scA.2d 943 (Cmwlth. Ct. 1984), a school diA.2d 943 (Cm

decreaseddecreased certain services. The case raised the isdecreased certain ser responsibilityresponsibility for responsibility for eresponsibility for educating handi relevantrelevant part ....the authorities establish overwhrelevant part ....the authorit rresponsresponsibilityresponsibility for identifying all exceptional children and c appropriateappropriate educational programs to meet their needs is placedappropriate school districts. Bermudian Springs at 945.

The Pennsylvania Public School Code Section 1372(3) provides:

> SpecialSpecial Classes or Schools Established and Maintained by School Districts.
> ExceptExcept as hereiExcept as herein oExcept as herein otherwise provide boardboard of school directors of everyboard of school directors of every s maintain,maintain, or to jointlmaintain, or to jointly pmaintain, or to join ddistricts,districts, special classes or schools in accordance wdistricts, approvedapproved plan... If tapproved plan... If the approvapproved pla feasiblefeasible to form a special class in any district orfeasible to form a spe educationeducation foreducation for such child in the public schools of the boardboard ofboard of school directors of the district shall secure suchboar educationeducation and training outsideeducation and training outside the oror in special institutions,or in special institutions, oror in special institution his home...

24 P.S. 13-1372(3)(emphasis added)

InIn contrast, 24 P.S. Section 1372(4) of the CodeIn contrast, 24 P.S. Section 137 powerspowers and duties of the Intermediatepowers and duties of the Intermedia administer,administer, supervise and operate suchadminister, supervise and oper areare necessary or to otherwise provide for the proper education and trainingtraining for all exceptional children who atraining for all exceptional chil

schoolsschools maintained and operated by schoschools maintained and operat

otherwise provided for. 24 P.S. Section 1372(4)(emphasis added)

The Court in Bermudian Springs further opined:

> The The regulations of the Department are even more ex The regulation placingplacing the primary resplacing the primary respplacing the opeoperationoperation of special education programs on the local scho districts.districts. 22 Pa. Code §13.11(b) identifdistricts. 22 Pa. Code §13.11 thethe the schoolthe school the school districtsthe school districts the school responsibresponsibilityresponsibility responsibility forresponsibility for resp oror training, or both, shallor training, or both, shall be that of a school distri schoolschool district board cannot school district board cannot prschool effectivelyeffectively and efficiently, it shall use teffectively and effi intermediateintermediate unit. The services of approved private interm statestate schoostate schools, andstate schools, and out-of-state institu hereinafterhereinafter hereinafter provided,hereinafter provided, hereinaft districtdistrict boards agrdistrict boards agree tdistrict boards agr effectivelyeffectively and efficiently for handicapped schoolagedeffectivel
>
> Finally,Finally, thisFinally, this court has repeatedly cited theFinally, this cour districts districts responsibility for specialdistricts responsibility for special KrawitzKrawitz v. Department ofKrawitz v. Department of Education, 48 Pa. A.2d 1202, 1205 (1979)...

Bermudian Springs at 946 *quoting* 22 Pa.Code §13.11(b)

Plaintiffs Plaintiffs §504 claim should further be barred for failingPlaintiffs §50 available administrative remedies. TTheThe Court in W.B. v. W.B. v. Matula , 67, 67 F.3d 492492 (1995), opined that the circumstances of492 (1995), opined that the circumstance determine whether administrative proceedings would have been futile:

> ...The ...The test whether exhaustion w ...The test whether exhaustion w reliefrelief sought in a civil action is not availablerelief sought in a administrativeadministrative proceeding,administrative proceeding, recou bebe fbe futile and the exhaustion requirement is excused. *Id*, at 49, at 496

> RecourseRecourse to adminstrative proceedings is futile where the HearingHearing OfficerHearing Officer lacks the authority to grant the relief at 496 *citing* House Report, 1986, U.S.C. C.A.N. at 7"

Matula, 67 F.3d at 496-97.

NoneNone of the claims for §504 relief are outside the None of the claims for § couldcould have easily been addressedcould have easily been addressed within the cont related services.

ToTo establish a violationTo establish a violation of §504, Plaintiffs must demonstra isis disabled as definedis disabled as defined by the Act; 2) he is otherwiseis disabled as d schooschoolschool activities; 3) the school or the board of education receives fedsch ffinancialfinancial assistance; 4) he was excluded from participation in, denied the benefitsbenefits of, or was subject to discrimination at,benefits of, or was subject to disc knewknew or should have kknew or should have known of hisknew or should h EducationEducation v. N.E. for M.E., 172 F.3d, 172 F.3d 238, 253 , 172 F.3d 238, 253 (3d Ci F.3d 484, 492 (1995)

There There appear There appear to be few differences, if any, between IDEA s Th dutyduty and §504's negativeduty and §504's negative prohibition. Indeed, the regulatio §504§504 adopt the IDEA language, re§504 adopt the IDEA language, requiring§504 adopt t fromfrom federal financial assistance shall provide a free appropriate pfrom feder educationeducation to each qualified handicapeducation to each qualified handicap jurisdiction. Matula at 493 *quoting* 34 C.F.R. §104.33(a).

SectionSection 504 has been described as the codification ofSection 504 has bee equalequal protectionequal protection forequal protection for handicapped persons, H 1362,1362, 11362, 1366 (1989) *quoting* Association for Retarded Citizens in ColoradoAs Frazier,, 517 F.Supp. 105, 1, 517 F.Supp. 105, 118 (D, 517 F.Supp. 105, 118 (D.Colo. requirementrequirement of nondiscrimination in allrequirement of nondiscrimination i atat 1366 *quoting* New Mexico Association for Retarded Citizens v. New Mexico, 678678 F.2d 847, 852 (10th Cir. 1982). Be Cir. 1982). Beyon Cir. 1982). Beyond its prohi however,however, Section 504 generallyhowever, Section 504 generally does not furnis toto the handicapped. Gilhool at 1366 *qquotiquoting* Southeastern Community College v. Davis, 442 U.S. 397, 410-11, 60 L.Ed. 2d 980, 99 S.Ct. 2361 (1979)

ThereThere is no accomThere is no accommodationThere is no accommodation outsideoutside of the IEP.outside of the IEP. outside of the IEP. The allegations contai moremore than restatements ofmore than restatements of the alleged IDEAmore than inin §504 are thereforein §504 are therefore subsumed by the IDEAin §504 are therefore evidenceevidence in the record to support Plaintiffsevidence in the record to support ofof of those cof those claims which are arguably outside the scope of the IDEA cl

Plaintiffs Plaintiffs ComPlaintiffs Complaint Plaintiffs Complaint fails to alleg establishestablish testablish that Plaestablish that Plaintiffs were deprived of a constitu nono recovery can lie ano recovery can lie againo recovery can lie against Defen requestsrequests this Honorable Court grant theirrequests this Honorable Court grant th

CivilCivil Procedure 12(b)(6), andCivil Procedure 12(b)(6), and dismiss the Defendants as p

B.B. COUNT II OF PLAINTIFFS COMPLAB. COUNT II OF PLAINTIFFS COMPLAINT FAILSB. UNDER THE INDIVIDUALS WITH DISABILITIES ACT (IDEA)

Plaintiffs Plaintiffs action for IDEAPlaintiffs action for IDEA violation should be barr toto exhaust administrative remedies, specto exhaust administrative remedies, specifi duedue procedue process againdue process against CIU 20 for any alleged failure to in District sDistrict s IEP. As argued above, CIU 20 is not an LEA obligated to provide FAPE. PlaintiffsPlaintiffs pursued due process against the Bethlehem Area School District but not CIU 20. (See appendix to Plaintiffs Complaint)

DisputesDisputes under IDEA are governed by the statutes three stage dispute resolutionresolution process. The first stresolution process. The first stage is aresc affordedafforded enumerated procedural protections. 20 U.S.C.§1415(f). Parties aggrievedaggrieved by the decision rendered by a hearing officeaggrieved by the dec state sstate s educational agencstate s educational agency.state s educational agency. aggrieved party to file a civil action. 20 U.S.C. §1415(i)(2).

AsAs a general rule, an aggrieved party must invoke a state s administrative proceduresadministrative procedures before bringing an IDEA claimadm court.court. 20 U.S.C. §1415(e)(2); W.B. v. Matula 67 F.3d 4 67 F.3d 484, 490 67 F.3d 4 1415(1415(i)(2)1415(i)(2) of IDEA adds to this exhaustion requirement by noting b141 brbringingbringing claims under other statutes that seek[] relief that is also availabrin underunder this subchapter, the admunder this subchapter, the administraunder thi

14151415 shall be 1415 shall be exhausted to1415 shall be exhausted to the same ext actionaction been brought under this subchapter. *See* Hunter v. MounHunter v. Moun School District, 95 F.3d 272, 277 (3d Cir. 1996).

SectionSection 1415(i)(2) is designed to preclude plaintiffs from taking claims thatthat could have beethat could have been brougthat could have been brought un under other statutes. *Id.* at 277

TheThe exhaustion requirements of IDEA are speciThe exhaustion requirement favoredfavored coursefavored course of action. This isfavored course of action. This is be administrativeadministrative proceduresadministrative procedures is to permit state ar cooperationcooperation with the parents or guardians of the chcooperation with th responsibilityresponsibility forresponsibility for formulating the education to be accor child. Board of Education v. Rowley, 458 U.S. 176, 207 (1982).

GivenGiven the underlying purpose of IDEA, exceptions to the eGiven the unde requirementrequirement are rare. *See* Matula. In fact, onl. In fact, only when it . In f thatthat recourse to an administrative proceeding would be futithat recourse to exhaustionexhaustion requirement excuexhaustion requirement excused.[1] A A A pla A p thatthat that pursuit that pursuit of administrative remedies would be futile is insu invokeinvoke the exception to exhaustion requirement. Hunter v. Mount Lebanon School District, 95 F.3d 272 (3d Cir. 1996).

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[1]AnotherAnother reason whyAnother reason why IDEA mandAnother reason why IDEA mandates the a a factual record to be developed. *See* W.B. v. Matula, 67 F.3d 484, 489

InIn the case at bar, any statement by Plaintiffs that pIn the case at bar, any administrativeadministrative remedies would be fuadministrative remedies would exceptionexception to exhaust requirement. Scott C. and his parentsexception to exhau administrativeadministrative redress agaiadministrative redress againstadministrative thatthat Plaintiffsthat Plaintiffs have that Plaintiffs have exhausted their adm BethlehemBethlehem School District, PlaintiffsBethlehem School District, Plaintiffs faile CIUCIU 20.CIU 20. Indeed, the pursuit of administrative remedies against BCIU 2 conclusivelyconclusively admits tconclusively admits thconclusively admits that adm apparentapparent that Plaintiffs present suit isapparent that Plaintiffs present suit is an itsits progeny support excusing the administrativeits progeny support excusing the adm thethe basis of oversight or second thought. IDEA proceduthe basis of oversight or s exhausted against CIU 20 and there has been no factual record developed.

PPlaintiffs Plaintiffs Complaint fails to allege facts, which if provenPlaintiffs establiestablishestablish thatestablish that Plaintiffs were deprived of a constitutional nono recovery can lie against Defendant CIU 20. Accordingly, CIU 20 no recovery can li thisthis Honorable Court grant their Motion pursuant to Federal Rule of Civil Procedure 12(b)(6), and dismiss the Defendants as parties to this action.

C.C. COUNT C. COUNT III OF PLAINTC. COUNT III OF PLAINTIFFS COMPLAINT FAILS TO S UNDER 42 U.S.C. SECTION 1983.

AnyAny liability pursuant to §1983Any liability pursuant to §1983 is predicated upo therefore must fail for the same reasons as the IDEA cause of action.

The Third Circuit in W.B. v. Matula, 67 F.3d 484 (3d. Cir. 1995) discusses the nature of the §1983 right of action as it impacts IDEA and §504:

> [6][6] Section 1983 does not confer substantive rights, be merely redressesredresses the deprivation of those riredresses the deprivation ThoseThose rights may be created by the Constitution or feThose righ statute;statute; and hence in a §1983 action a statute; and hence in a § federalfederal statutory violations by state agents. MaineMaine v.Maine v. T 448448 U.S. 1, 5-6, 100 S.Ct. 2502, 2504-05, 65448 U.S. 1, 5-6, 100 S.Ct. 2502, 2504- encompassesencompasses claims based encompasses claims based on federal law)
>
> [7][7] When the[7] When the rights at issue are statutory, however, a[7] When t iisis impermissible when Congress intended to foreclose is impermiss pprivaprivateprivate enforcement. Wright v. Roanoke Redevelopment HousingHousing Authority, 479, 479 U.S. 418, 423, 107, 479 U.S. 418, 423, 107 S 781781 (1987).781 (1987). Such an intent is generally found either in the expre languagelanguage of a statute or where a statutory remediallanguage of a st comprehensivecomprehensive that an intent to prohibit enforcemcompr than by the statute s own means may be inferred. *Id.*
>
> Matula 67 F.3d 484

NotwithstandingNotwithstanding Notwithstanding theNotwithstanding the Notwi thethe standards required to attain liability under §1983 still pertain. [2] To establishestablish liability against the Intermediateestablish liability against the Inter mustmust establish more than edmust establish more than educatiomust establi negligencenegligence on the part of the School officials. To establish liability under §1983,§1983, the §1983, the Par§1983, the Parents must show that the Intermediate U

[2]WhileWhile undeWhile under MatulMatula damages could be available under §1415(e)(2) for mere provideprovide FAPE, a higher standard muprovide FAPE, a higher standard must be met to pprovide FAPE, a SchoolSchool District, 141 F.3d 524 (4th Cir. 1998)(discusses incompatibility of Cir. 1998)(discusses incompatibil standards.)

recklesslyrecklessly estarecklessly establisherecklessly established and maintained a
causedcaused a constitutional harm or denied Scott C. his statutory rights. D.D.R. vD.R
L.R.L.R. vL.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364 (3d Cir.
1992).1992). The facts related in Plaintiff s Complaint simply do1992). The facts related i
establishingestablishing Liabiltyestablishing Liabilty against CIU 20 under §1983 liability pr
factsfacts show nothing more than a difference offacts show nothing more than a diffe
C. sC. s educational program. It is significant in this regard that theC. s educational pro
thethe Appeals Panel attachedthe Appeals Panel attached tothe Appeals Panel attached t
notnot dennot deny Scnot deny Scott C. FAPE during the 1998-1999 school year
proposed IEP for the 1999-2000 school year was appropriate.

Plaintiffs Plaintiffs Complairt fails Plaintiffs Complairt fails to alPlaintiffs Co
requiredrequired to establishrequired to establish liability under §1983. [A] local goverr
suesuedsued undesued under §1983 for an injury inflicted solely by its employees or
Instead,Instead, it iInstead, it is when Instead, it is when execution of a government s
mademade by its lawmakers or by those edicts or acts may fairlymade by its lawr
representrepresent official policy, inflicts the injuryrepresent official policy, inflicts the
isis responsible under 1983". Monell v. Dept. of Soc.Monell v. Dept. of Soc. Serv.Monell v
436 U.S. 690, 694.

AA single, isolated incident is insufficient to establish that Defendant
SchoolSchool DistriSchool DistricSchool District had a policy, practice and custom. Isc

establishestablish establish a pattern of behavior. Beck v. City of Pittsburgh, 89 F.3d 9
(3rd Cir. 1996). In order for liability to be imposed, Cir. 1996). In order for liability to be i
patternpattern of persistent and widespread unconstitutional practpattern of
DefendantDefendant CIU 20 that had become so permanent and well settled as to have
thethe force and effecthe force and effect othe force and effect of law. Monell, 436
SchoolSchool District of St. Louis Co., 901 F.2d 642, 646 (8th Cir. Cir. 1990). *See also,* Beck
v.v. City of Pittsburgh, 89 F.3d 966, 972 (3rd Cir. 1996)(sufficient number of civil
complaintscomplaints recomplaints regardcomplaints regarding use of excessive force
policepolice department knew or should havepolice department knew or should have kn
behaviorbehavior in arresting citizens,behavior in arresting citizens, even when the arres
orderlyorderly fashion, coorderly fashion, complied worderly fashion, complied wi
offeredoffered no resoffered no resistence);offered no resistence); SSimmons v. City of Pl
Cir.Cir. 1991)(evidence thatCir. 1991)(evidence that city of Philadelphia officials were awa
ofof suicides in of suicides in cityof suicides in city lockups and of the alternatives for
eithereither deliberately chose not to pursue thoseither deliberately chose not to pur
lonlonglong-standinglong-standing policy or custom of inaction in this regard); Bi
Dubinon,, 915 F.2d 845, 853 (3rd Cir. 1990)(sufficient Cir. 1990)(sufficient evidence that the
long-establishedlong-established custom in the city of Pittsburgh police departmer
arrestingarresting and detaining individuals on charges of public intoxication without
probableprobable cause and probable cause and with no probable cause and with no

hearing)

ProofProof of the meProof of the mere existProof of the mere existence
insufficientinsufficient to maintaiinsufficient to maintain a insufficient to maintain a §
burdenburden of proving that the burden of proving that the municipal burden of p
thethe injuries suffered. Losch v. Borough of Parkesburg,Losch v. Borough of Parkesbu
(3rd Cir. 1984). To establish the Cir. 1984). To establish the neces Cir. 1984).
demonstratedemonstrate a plausible nexus or affirmative link between th
municipality s municipality s custom and the specific deprivation of constitutionalmunici
isissue. issue. *Id.* (Citations omitted). Such can be accomplished by demonstra (Citatio
that that policymakers are aware that policymakers are aware of similar that policymak
precautionsprecautions against future violations, and that this failure,precautions agains
to their injury. *Id.* At 851.

PPlaintiffs Plaintiffs Complaint fails to allege facts, which if provenPlaintiffs
establiestablishestablish thatestablish that Plaintiffs were deprived of a constitutional
nono recovery can lie against Defendant CIU 20.no recovery can lie against Defendant CI
requestrequest this Honorable Court grant their Motion pursuant torequest this Honora
CivilCivil Procedure 12(b)(6),Civil Procedure 12(b)(6), and dismiss the Defendants as partie

IV. CONCLUSION

Plaintiffs Plaintiffs Complaint clearly failsPlaintiffs Complaint clearly fails to st DefendantDefendant CIU 20. Accordingly, the Motion of Defendant CIUDefendant CIU 20 FederalFederal Rule of Civil ProcedureFederal Rule of Civil Procedure 12(b)(6) shouldFeder dismissed as a party Defendant.

RESPECTFULLY SUBMITTED,

KING, SPRY, HERMAN, FREUND & FAUL

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